No. 92-1302

Supreme Court, U.S.
FILED
FEB 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL RAW MATERIALS, LTD.,

Petitioner,

—v.—

STAUFFER CHEMICAL COMPANY, RHONE POULENC, INC., TG SODA ASH, INC., GENERAL CHEMICAL PARTNERS, TENNECO MINERALS CO., FMC WYOMING CORP., KERR-MCGEE CHEMICAL CORP., and AMERICAN NATURAL SODA ASH CORP.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT AMERICAN NATURAL SODA ASH CORP. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PATRICK W. KITTREDGE
JOSEPH M. DONLEY
KITTREDGE, DONLEY, ELSON, FULLEM & EMBICK
421 Chestnut Street
Philadelphia, Pennsylvania 19106
(215) 829-9900

NORMAN H. SEIDLER
CHARLES H. CRITCHLOW
Counsel of Record
DAVID A. SCHWARTZ-LEEPER
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4400

Attorneys for Respondent
AMERICAN NATURAL SODA ASH CORP.

February 23, 1993

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Does the fact that American members of an export trade association are wholly or partially foreign-owned lift the Webb-Pomerene Act's exemption for acts done or agreements made by the association in the course of its export trade ?

2. Does a terminal operator who claims it was injured by a Webb-Pomerene association's actions in entering into terminalling agreements to load its product onto ships in the course of its export trade have standing to challenge the Webb-Pomerene antitrust exemption for such acts based on a conclusory argument that the association is part of an alleged soda ash price-fixing cartel, when the terminal operator neither buys nor sells soda ash ?

RULE 29.1 STATEMENT

Respondent AMERICAN NATURAL SODA ASH CORP. ("ANSAC"), is a Delaware non-stock membership corporation. It has no parent companies and no subsidiaries other than wholly-owned subsidiaries. The members of ANSAC are FMC Wyoming Corporation, General Chemical (Soda Ash) Partners, North American Chemical Company, Rhône-Poulenc Basic Chemicals Company, Solvay Soda Ash Joint Venture and Tg Soda Ash, Inc.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

Counterstatement of Facts 2

Proceedings Below 4

REASONS FOR DENYING THE WRIT 10

I. The Courts Below Held Correctly that Foreign Ownership of ANSAC Members Did Not Disqualify ANSAC for the Antitrust Exemption of the Webb-Pomerene Act 11

II. The Courts Below Held Correctly that ANSAC's Terminalling Arrangements Would Remain Exempt Under Webb-Pomerene Even if ANSAC Had Conspired with Foreign Parties to Depress Competition in the Soda Ash Industry 15

III. There Is No Conflict Between the Decision Below and Other Rulings by This Court or in Other Circuits 19

CONCLUSION 23

Appendix

Opinion of the District Court for the Eastern District of Pennsylvania, dated June 22, 1989, in No. 87-7541 . 1a

TABLE OF AUTHORITIES

Cases *Page*

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) 18

Beltz Travel Service, Inc. v. International Air Transport Association, 620 F.2d 1360 (9th Cir. 1980) 19

Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384 (1967) 21

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 18

Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1976) 14

In re Export Screw Association of the United States, 43 F.T.C. 980 (1947) 16

In re Florida Hard Rock Phosphate Export Association, 40 F.T.C. 843 (1945) 16

Gregory Marketing Corp. v. Wakefern Food Corp., 787 F.2d 92 (3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986) 18

Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979) 19

Hartford Fire Insurance Co. v. California, No. 91-1111 20

Cases *Page*

Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau, 701 F.2d 1276 (9th Cir. 1983) 20

National Broiler Marketing Association v. United States, 436 U.S. 816 (1978) 21

In re Phosphate Export Association, 42 F.T.C. 555 (1946) 13, 16

In re Sulphur Export Corp., 43 F.T.C. 820 (1947) 16

United States v. Alkali Export Association, Civ. No. 24-464 (S.D.N.Y. 1951) 17

United States v. Anthracite Export Association, 1970 Trade Cas. (CCH) ¶ 73,348 (M.D. Pa. 1970) 17

United States v. Concentrated Phosphate Export Association, 1969 Trade Cas. (CCH) ¶ 72,719 (S.D.N.Y. 1969) 17

United States v. Minnesota Mining & Manufacturing Co., 92 F. Supp. 947 (D. Mass. 1950) . . . 11, 13, 17

Statutes

Capper-Volstead Act, 7 U.S.C. § 291 21

TABLE OF AUTHORITIES

Statutes *Page*

Export Trading Company Act,
15 U.S.C. §§ 4001, *et seq.* 12

Federal Aviation Act of 1958,
49 U.S.C. § 1384 19

McCarran-Ferguson Act,
15 U.S.C. §§ 1011, *et seq* 19, 20

Webb-Pomerene Act,
15 U.S.C. §§ 61, *et seq.* . . . . . *passim*

Administrative

Federal Trade Commission, *Advisory Opinion*,
83 F.T.C. 1840 (1973) 14

Federal Trade Commission, *Brochure for Exporters, Activities and Practices* (1982) 14

Federal Trade Commission, *Webb-Pomerene Associations: Ten Years Later* (Staff Analysis Nov. 1978) . . 11

Legislative

53 CONG. REC. 13,730-31 (1916) 13

H.R. 9449, 94th Cong., 1st Sess. (1975) 13

TABLE OF AUTHORITIES

Legislative

Page

S. 1973, 94th Cong., 1st Sess. (1975) 13

International

Commission Decision of 19 December 1990, 34 O.J. EUR. COM. (No. L 152) 1 *et seq.* (1991) 16

Miscellaneous

Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANS. L. 673 (1982) 14

U. S. Dept. of Justice, Brief of United States As Amicus Curiae Supporting Respondents in *Hartford Fire Insurance Co. v. California*, No. 91-1111 20

No. 92-1302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL RAW MATERIALS, LTD.,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
RHONE POULENC, INC.,
TG SODA ASH, INC.,
GENERAL CHEMICAL PARTNERS,
TENNECO MINERALS CO.,
FMC WYOMING CORP.,
KERR-McGEE CHEMICAL CORP., and
AMERICAN NATURAL SODA ASH CORP.,
Respondents.

BRIEF OF RESPONDENT AMERICAN NATURAL SODA ASH CORP. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This case presents the simple issue of whether the operator of a stevedoring terminal used to load export goods onto ocean-going vessels can challenge a Webb-Pomerene association, comprised entirely of producers of U.S. soda ash, when that association seeks proposals from terminals for loading its goods in export and decides to accept a more competitive offer from a rival terminal. Two district court judges and the Court of Appeals below have uniformly come to the unremarkable conclusion that such activities are protected by the Webb-Pomerene antitrust exemption for acts

in the course of export trade. This conclusion is neither novel nor controversial, and is supported by over seventy years of consistent precedent. Nothing in the lower court's decision raises a conflict with any decision of this Court or any Court of Appeals, nor are there any special or important reasons requiring Supreme Court review. Accordingly, the petition for a writ of certiorari should be denied.

STATEMENT OF THE CASE

Counterstatement of Facts

Respondent ANSAC is a duly-registered Webb-Pomerene association organized to engage solely in export trade under the provisions of the Webb-Pomerene Act. (Pet. App. A-31.) The other respondents are all United States corporations or partnerships, each of which has its principal place of business in the United States, each of which at all relevant times has been engaged in the production of soda ash in the United States, and each of which has at all relevant times been a member of ANSAC. (*Id.*) Petitioner International Raw Materials, Ltd. ("IRM") operates a shipping terminal in Port Longview, Washington, where it loads dry white bulk product, including soda ash, onto ocean-going vessels. (Pet. App. A-30.) Petitioner neither produces nor purchases soda ash. (Pet. App. A-16 & n.10.)

The Webb-Pomerene Act provides an antitrust exemption for associations formed to sell goods in export and for agreements made and acts done by such associations in the course of their export trade. 15 U.S.C. §§ 61, *et seq.* (Pet. App. A-53-54.) The Act has no requirement specifying what exporters of U.S. goods may be Webb-Pomerene members or who must own the U.S.-based facilities which manufacture those goods. The statute contains no restrictions on who may belong to a Webb-Pomerene association, nor

any prohibition on membership by American companies with foreign ownership. (*Id.*)

Since 1983, the members of ANSAC have used this Webb-Pomerene association as their outlet for exporting U.S. soda ash. ANSAC fulfills its export sales commitments by taking title to soda ash at its members' inland manufacturing plants and thereafter taking all steps necessary to move its soda ash from the United States to its overseas customers. These steps include the procuring of terminalling, the physical act of unloading ANSAC's product from rail cars and loading that product onto ocean-going vessels at U.S. ports. (Gardner Affidavit, Appendix below at A.25 *et seq.*)

In furtherance of the Webb-Pomerene Act's export trade promotion objective, ANSAC is committed to finding the most efficient manner of moving its product overseas. To this end, shortly after its formation, ANSAC asked several West Coast terminalling companies, including Petitioner IRM, to submit proposals for loading its soda ash onto ships for export. ANSAC thereafter accepted IRM's proposal to load two-thirds of ANSAC's West Coast exports for a three year period. (Pet. App. A-4.)

As its agreement with IRM neared expiration, ANSAC again solicited and received proposals from Petitioner and other West Coast ports for a new terminalling services contract. After a careful cost analysis, in October 1987 ANSAC moved its business from Petitioner to a rival operator, Hall-Buck Marine, Inc. ("Hall-Buck" or "HBM"), under a five year agreement (the "Terminalling Agreement") which promised ANSAC rates substantially lower than those ANSAC had previously negotiated with Petitioner. (Pet. App. A-4.) It was only at this point that IRM began to complain about ANSAC's activities.[1]

---

[1] Indeed, when IRM first learned of ANSAC's formation, IRM hailed it as a development "long overdue" and noted that IRM itself had pursued a "parallel" course of obtaining an Export Trading Company

Proceedings Below

Less than one month after ANSAC decided to take its business to a competitor, Petitioner brought suit in the Eastern District of Pennsylvania. IRM's one-count complaint challenged only ANSAC's negotiation of the price it would pay for terminalling services, and charged ANSAC and its members with conspiring to fix the prices buyers would pay for terminalling services in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Pet. App. A-32.)

Respondents moved to dismiss on the grounds that the conspiracy alleged in the complaint actually was Respondents' formation of a Webb-Pomerene association (ANSAC) in order to sell their soda ash in export, and that the terminalling services at issue consisted of the loading of ANSAC's soda ash aboard ocean-going vessels destined for its overseas customers, an act "in the course of export trade" as that term is used in the Webb-Pomerene Act and therefore exempt from the antitrust laws. (Pet. App. A-5.) Since then, two district court judges and the Court of Appeals for the Third Circuit have reviewed IRM's claims in depth and have consistently agreed with Respondents that they have no merit.

The First District Court Opinion.[2] The first district court (Hannum, J.) concluded that the Webb-Pomerene Act's explicit language, its objectives, legislative history, and over seventy years of administrative enforcement and judicial interpretation established as a matter of law that ANSAC's contracting for the loading of its soda ash onto ocean-going vessels for shipment overseas was an act "in the course of

---

certificate. (Andrews Affidavit, Appendix below at A.853 *et seq.*)

[2] Petitioner omitted this extensive decision, reported at 716 F. Supp. 188 (E.D.Pa. 1989), from its Appendix; accordingly, it is appended to this brief.

export trade," and therefore fell "squarely within" the Webb-Pomerene exemption. (Resp. App. 5a.) The court rejected IRM's argument that ANSAC had in some way entered the terminalling business through its new Terminalling Agreement with Hall-Buck and thus was not engaged solely in export trade as required by the Act. Rather, based on the statutory definition of "export trade," the district court held that the Terminalling Agreement was within "the course of export trade" and thus was within the "sole purpose" exemption of the Act and that "a cost-cutting long term lease for terminalling services, or for any other export service, would appropriately further the goals of the Webb Act by encouraging exports." (Resp. App. 8a.)

Finally, the district court rejected IRM's argument that foreign ownership of certain ANSAC members disqualified ANSAC for the Webb-Pomerene exemption. It found no support in the language of the Webb-Pomerene Act itself for Petitioner's position, nor did the statute's legislative history demonstrate a clearly expressed legislative intention to prohibit foreign interests in members of Webb-Pomerene associations. (Resp. App. 9a.)[3] Various factual issues IRM had attempted to raise regarding purported anti-competitive conduct unrelated to the complaint's allegations about terminalling, including unsupported allegations regarding domestic soda ash price fixing, were found to be immaterial because, even if true, those issues could not affect ANSAC's entitlement to Sherman Act exemption for its dealings with Petitioner or the terminalling industry more generally. (Resp. App. 9a-10a.)

---

[3] Moreover, it should be noted that at the time ANSAC contracted for terminalling services and switched its business from IRM to Hall-Buck, neither Respondent Stauffer Chemical Company, nor Respondent Tenneco Minerals Company, nor the soda ash production of Respondent Kerr-McGee had any foreign ownership, nor did any foreign soda ash producer have any ownership interest in any ANSAC member.

The First Appellate Opinion. On appeal, IRM raised four arguments: (1) whether summary judgment should be deferred until an "adequate factual record was established;" (2) whether "defendants' price fixing" in the terminalling of their product fell outside the Webb-Pomerene Act as shown by the express language of the statute and its legislative history; (3) whether ANSAC could qualify for a Webb-Pomerene exemption when some of its members were foreign-owned; and (4) whether ANSAC and its members had lost their Webb-Pomerene exemption by entering the terminalling business for products other than soda ash as a result of entering into the Terminalling Agreement with Hall-Buck. (Pet. App. A-48.)

The appellate court did not find any issues of fact requiring further discovery with respect to IRM's first three arguments, but vacated the grant of summary judgment as "premature" until a more complete factual record had been developed as to the nature of the ANSAC/Hall-Buck relationship. Accordingly, the case was remanded for further discovery limited to IRM's fourth appeal issue. (Pet. App. A-6, A-48.)

The Second District Court Opinion. Following full discovery upon the ANSAC/Hall-Buck relationship, Respondents' summary judgment motion was renewed. IRM responded by amending its complaint to describe the foreign ownership of certain ANSAC members and cross-moved for summary judgment on the ground that these ownership interests rendered ANSAC ineligible for the Webb-Pomerene exemption as a matter of law. In addition, IRM added a second count alleging that ANSAC's decision to switch its business to the less expensive Hall-Buck terminal constituted an illegal "boycott" of its terminal. (Pet. App. A-6.) In addition to presenting the same arguments it had initially raised against Respondents' summary judgment motion, IRM further contended that summary judgment on Respondents' renewed motion was precluded by issues of fact relating not

only to terminalling, but to a purported international soda ash price fixing "cartel."

Summary judgment for Respondents was again granted, this time by a second district court judge. (Pollak, J.) Consistent with the first summary judgment opinion, the district court again concluded that Petitioner's position that foreign ownership of certain ANSAC members was grounds to deny ANSAC Webb-Pomerene status had absolutely no support in either the language of the statute (which contains no membership requirements), or in its legislative history (in which amendments which would have excluded foreign-owned members were expressly considered and rejected). (Pet. App. A-36-37 & n.9.)

Finding that the details of the ANSAC/Hall-Buck relationship were clear, the district court held that "[t]he evidence of record, though providing a full view of the ANSAC-HBM relationship, cannot be construed as suggesting that ANSAC's current relationship with HBM at the Port of Portland terminal in any way exceeds the scope of activity permitted by the Webb-Pomerene Act as activity done 'in the course of export trade.'" (Pet. App. A-40.) The district court therefore concluded that as a qualified Webb-Pomerene association ANSAC had an "absolute defense" to the antitrust causes of action recited in the amended complaint with respect to the procurement of terminalling services which was alleged to have caused Petitioner harm. (Pet. App. A-42.) Finally, the Court rejected Petitioner's arguments for discovery into alleged soda ash price fixing, noting that IRM, as neither a consumer nor a producer of U.S. soda ash, had no standing to assert such claims. (Pet. App. A-41 n.14.)

The Second Court of Appeals Opinion (The Decision Below). On appeal for the second time before the Third Circuit, Petitioner again argued that: (1) foreign ownership of ANSAC's members deprived the Respondents of the Webb-Pomerene antitrust exemption for acts done or

agreements made by ANSAC in the course of its export trade; (2) ANSAC had conspired with non-exempt foreign soda ash producers to depress competition in the soda ash industry; and (3) ANSAC's Webb-Pomerene exemption was invalidated by ANSAC's supposed entry into the terminalling business as a result of the Terminalling Agreement with Hall-Buck. (Pet. App. A-2.) A three-judge panel of the Third Circuit unanimously affirmed the district court's grant of summary judgment for Respondents on all three issues.

The Terminalling Agreement. The Third Circuit dismissed Petitioner's argument that the Terminalling Agreement with Hall-Buck put ANSAC in the terminalling business, observing that ANSAC did not share in any business losses that might be incurred by Hall-Buck's terminal nor did ANSAC have any right to control the performance of the terminal. Accordingly, it agreed with the district court that the fact that ANSAC was able to secure favorable rates by nothing more than a volume discount did not render ANSAC's acts or agreements outside the Webb-Pomerene Act's exemption for acts in the course of export trade. (Pet. App. A-27.)

Foreign ownership. Unsurprisingly, the appellate court rejected Petitioner's position that foreign ownership of ANSAC's members disqualified ANSAC from the Webb-Pomerene exemption for the same reasons that had twice been given by two district court judges:

> Nothing in the language of the statute or its legislative history explicitly restricts membership in Webb-Pomerene associations to American-owned firms. Indeed, the House of Representatives considered and rejected statutory language to that effect. (Pet. App. A-9.)

The court also agreed with the district court that permitting foreign-owned firms that export goods from the United States to participate in Webb-Pomerene associations was not inconsistent with the Act's purpose of benefitting American interests because such firms employ American workers, purchase American services and raw materials, and pay American taxes. (Pet. App. A-12.)

Contrary to Petitioner's assertion which implies that the Third Circuit was unable to find support for rejecting IRM's arguments (Pet. 7), after reviewing the authorities the court found that none of the case law cited by Petitioner supported Petitioner's position or negated the plain meaning of a statute containing no prohibition against foreign-owned producers of U.S. export goods being members of a Webb-Pomerene association. Rather, Petitioner's authorities stood for the different proposition that the Webb-Pomerene exemption is limited to the business of exporting goods from the United States. "All of ANSAC's members produce goods for export from the United States and thus all engage in 'export trade' as it is defined by the statute," the appellate court concluded. (Pet. App. A-9-15.)

Finally, although Petitioner argues that the Third Circuit failed to consider its claims that certain foreign owners of ANSAC members were also overseas competitors (Pet. 6), the Court of Appeals acknowledged this contention at the outset of its opinion (Pet. App. A-3 n.2) and dealt with it in the course of addressing IRM's "alleged conspiracy with non-immune parties." (Pet. App. A-15 *et seq.*)

The Alleged "Soda Ash Conspiracy." The Third Circuit was unpersuaded by Petitioner's conclusory assertion that ANSAC's members were supposedly being used by their foreign owners as front companies to cartelize the international soda ash market. Rather, the appellate court held such contentions were irrelevant because any harm caused by an alleged cartelization of the soda ash industry:

> falls on producers or purchasers *of soda ash*. In contrast, IRM is a terminal operator, and the harm its suit alleges is that ANSAC has depressed competition in the market for terminalling services. (Pet. App. A-16.) (emphasis in original.)

The Court of Appeals found that Petitioner had offered "no basis" for its conclusory assertions that ANSAC's activities had decreased competition in the terminalling market. Because Petitioner had "failed to develop a claim that ANSAC's alleged restraint of trade in the *soda ash* market has resulted in decreased competition in the *terminalling* market," (*id.*; emphasis added), the Third Circuit concluded that IRM lacked standing to challenge the alleged soda ash conspiracy. (Pet. App. A-18-19.)

Significantly, Petitioner IRM has chosen not to seek review of the Court of Appeals' ruling on the issue that occupied so much judicial attention below: whether ANSAC's negotiation for terminalling services by Hall-Buck was "in the course of export trade" and thus protected by the Webb-Pomerene exemption. (*See* Pet. 6 n.2, dropping the issue "because it is essentially a factual dispute limited to this case.") That decision was undeniably correct for the reasons the various courts have stated. (Pet. App. A-22-27, A-38-42; Resp. App. 4a-7a.) Rather, Petitioner now rests its appeal on the questions of ownership and an alleged cartel of which it has no standing to complain.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is correct and does not conflict with any decision of this Court or any other Court of Appeals. The decision below rests on unremarkable principles of antitrust law and the determination, in which two district court judges and a three-member panel of the

Court of Appeals have concurred, that the plain meaning of the language of the Webb-Pomerene Act, as well as the statute's legislative history, objectives and over seventy years of judicial and administrative precedent, all compel the conclusion that ANSAC's activities in securing terminalling services for its soda ash are "in the course of export trade," as that term is defined in the Act, and therefore exempt from the antitrust laws.

The loading of goods onto ocean-going vessels for shipment overseas is the quintessential example of activities "done in the course of export trade." Petitioner's dissatisfaction with losing ANSAC's business to a rival is simply an "inevitable consequence" of a cost-cutting high volume Terminalling Agreement wholly within the scope of the Webb-Pomerene exemption.[4] Summary judgment was appropriately granted, and affirmed, by the courts below. Further review is not warranted.

I. The Courts Below Held Correctly that Foreign Ownership of ANSAC Members Did Not Disqualify ANSAC for the Antitrust Exemption of the Webb-Pomerene Act

Although Petitioner claims that the question of foreign ownership of Webb-Pomerene members is of "critical importance" (Pet. 15),[5] Petitioner offers no authority for its

---

[4] *See* the first district court opinion at Resp. App. 7a, citing *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947, 965 (D. Mass. 1950).

[5] There is more than a little hyperbole in this claim of "critical importance," given that the Webb-Pomerene Act has had relatively little significance to overall U.S. exports. *See* Federal Trade Commission, *Webb-Pomerene Associations: Ten Years Later* (Staff Analysis Nov. 1978), noting that since 1918 the share of U.S. exports handled by Webb-Pomerene associations had shrunk to less than 2%. In 1982, Congress

contention that membership in a Webb-Pomerene association is limited to American-owned companies, nor could it. As each of the courts below consistently found, the language of the Act, its legislative history and objectives, and more than seventy years of judicial and administrative application contain no prohibitions against foreign ownership of Webb-Pomerene members.

The Court of Appeals correctly held that nothing in the language of the Act restricts membership in Webb-Pomerene associations to American-owned firms. (Pet. App. A-9.) The Act has no requirement specifying what exporters of U.S. goods may be members of a Webb-Pomerene association or who must own the U.S.-based facilities which manufacture those goods. It contains no restrictions on who may belong to a Webb-Pomerene association, much less a prohibition on membership by American companies with foreign ownership. (Pet. App. A-53-56.) Since the statute's enactment in 1918, there have been no changes in its scope. No Webb-Pomerene association membership criteria have ever been adopted, and there have been no amendments relating to ownership of an association's members.

Nothing in the legislative history of the statute limits membership in Webb-Pomerene associations to American-owned firms. To the contrary, as the Court of Appeals observed, when enacting the Webb-Pomerene Act, Congress considered an amendment that would have limited participation in Webb-Pomerene associations solely to U.S. corporations and citizens, as well as an amendment that would have required that Webb-Pomerene associations have at least 60 percent American ownership. Neither amendment was adopted. Instead, it was recognized in the course of the

---

passed the Export Trading Company Act, 15 U.S.C. §§ 4001, *et seq.*, which made export trading companies a more attractive vehicle for most exporters than the Webb-Pomerene Act; and since then the significance of the older exemption has undoubtedly further declined.

debate that some foreign ownership in a Webb-Pomerene association could be beneficial. (Pet. App. A-9.)[6]

Finally, no case law holds that foreign ownership of an American producer prevents that producer from joining a Webb-Pomerene association to promote the export of its U.S.-produced goods or that Webb-Pomerene members cannot have overseas affiliations.[7] To the contrary, in *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950), the court required that the Webb-Pomerene association divest itself of capital stock in overseas production but said there would be no prohibition against individual members of that association owning such production and stated that its decree would *expressly contemplate* allowing individual members to establish and operate factories in foreign nations to supply foreign markets. 92 F. Supp. at 962. The practical effect of that decree was to have ownership of some of the association's most vigorous overseas competitors transferred to its individual members. Yet the *Minnesota Mining* court not only allowed that to

---

[6] Citing 53 CONG. REC. 13,730-31 (1916). Similarly, in 1975 Congress considered and rejected legislation which would have limited Webb-Pomerene membership to U.S. citizens or U.S. corporations. H.R. 9449 & S. 1973, 94th Cong., 1st Sess. (1975).

[7] The only case in which it was held that a foreign-owned company was not properly a Webb-Pomerene member involved a company which did *not* produce any goods in the United States for export and had no function whatsoever other than to serve as the agent for a foreign purchaser. *In re Phosphate Export Ass'n*, 42 F.T.C. 555, 843-44 (1946) (ruling that a company which had never produced any phosphate could not be a member of a Webb-Pomerene association because it was never actually engaged in the exportation of phosphate from the United States). Here, by contrast, it is undisputed that *all* of ANSAC's members produce U.S. goods for export by ANSAC. (*See* Pet. App. A-3 and appellate discussion at A-14.)

happen, but also allowed the Webb-Pomerene association to continue with its membership unchanged.

Moreover, as the Court of Appeals noted, when asked to advise whether a domestic corporation owned or controlled by a foreign corporation could be a Webb-Pomerene association member, the Federal Trade Commission (which is charged with administering the Webb-Pomerene Act (15 U.S.C. § 65)) responded affirmatively. *Advisory Opinion*, 83 F.T.C. 1840 (1973) ("The Commission is of the opinion that membership in an export [Webb-Pomerene] association by a United States corporation, which is owned or controlled by foreign interests, in and of itself, would not violate the laws administered by the Commission"). (Pet. App. A-13 n.9.)[8]

Lacking any authority in the Act, the legislative history, or the case law for its contention that foreign ownership prevents a U.S. producer from membership in a Webb-Pomerene association, Petitioner instead argues that "the leading commentator" on the Webb-Pomerene Act "counsels" against foreign ownership. (Pet. 11; quoting Fugate, *The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act*, 15 VAND. J. TRANS. L. 673, 691 (1982).) The Court of Appeals rightly disregarded this same argument when Petitioner raised it below. The author of the passage quoted was citing from a page of prohibited activities listed in an FTC brochure; a copy of that page shows that the prohibited activity was ownership by associations *of* foreign producers, and that is all that is prohibited by the decisions Petitioner's "leading commentator" cites as well. FTC, *Brochure for Exporters, Activities and Practices* at 7 (1982).

---

[8] In this regard, it bears noting that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1976).

In short, the plain meaning of the Webb-Pomerene Act, the statute's legislative history and objectives, as well as three-quarters of a century of consistent judicial and administrative precedent, all support the Court of Appeal's ruling. No further review of this issue is necessary or warranted.

II. The Courts Below Held Correctly that ANSAC's Terminalling Arrangements Would Remain Exempt Under Webb-Pomerene Even if ANSAC Had Conspired with Foreign Parties to Depress Competition in the Soda Ash Industry

The plain language of the Webb-Pomerene Act itself and over seventy years of judicial and administrative application of the statute establish the unremarkable proposition that, even if an association or its members engage in non-protected activities, the exemption continues to apply and to protect those activities which are within its scope. Thus, it is not surprising that the courts below uniformly held that even if some actionable restraint were found in the *soda ash* market, the Webb-Pomerene exemption would still protect ANSAC's procurement of *terminalling services* in the course of exporting its goods overseas.[9]

---

[9] Respondents dispute any allegation that they have in any way restrained U.S. soda ash trade in concert with overseas competitors. Indeed, not only was there no evidence whatsoever to support Petitioner's assertions, but as Respondents noted to the courts below:

(a) Contrary to Petitioner's assertions that soda ash prices have risen "necessarily" causing quantities shipped to decline (Pet. 12-13), Petitioner's own evidence shows that the prices U.S. customers *actually paid* after ANSAC's formation *declined* from $76.96 per ton in 1983 to $67.00 in 1984 to $66.96 in 1988. *See* Minerals Yearbooks 1983-88 (Appendix below at A.754, A.749, and A.732). And statistics from the U.S. Department of the Interior, Bureau of Mines, show that far from

The Court of Appeals correctly observed that the Webb-Pomerene Act itself provides that if an association has acted in restraint of trade within the United States, the Federal Trade Commission is "to make to such association recommendations for the readjustment of its business, *in order that it may thereafter maintain its organization and management and conduct its business in accordance with law.*" (Pet. App. A-21-22, quoting 15 U.S.C. § 65 (emphasis in original).) Thus, adjustments of an association's business to preclude unpermitted activities have been required where the FTC has found non-exempt domestic restraints, but the FTC has not terminated any association's exemption.[10]

---

cooperating with overseas producers, ANSAC took substantial market share at their expense, nearly *tripling U.S. soda ash exports* from 1,109,000 tons in 1982 to 2,919,000 tons in 1989. Appendix below A.726-68 at A.758 and A.728.

(b) The actions by the Japanese which Petitioner cites (Pet. 14 n.12) occurred in their local market, involved local producers who were not ANSAC members, and were brought to the Japanese government's attention by ANSAC. Indeed, one year before, Japanese producers were so upset with U.S. competition that they threatened to bring dumping charges. *See* Appendix below at A.743, A.737.

(c) The European Community decisions cited by Petitioner actually found that the U.S. market was characterized by "strong price competition" and that the European producers were acting to exclude that competition from their markets and had been successful despite vigorous efforts by U.S. producers to compete, largely because of import duties imposed by the authorities. *See* Commission Decision of 19 December 1990, 34 O.J. EUR. COM. (No. L 152) 1 *et seq.* (1991), at ¶¶ 2, 13, 17. Moreover, although the Commission declined to grant ANSAC a negative clearance to market into the Common Market, it expressly stated that activities involving joint storage and transportation would receive its "favourable consideration." 34 O.J. EUR. COM. (No. L 152) at 59-60.

[10] *See In re Florida Hard Rock Phosphate Export Ass'n*, 40 F.T.C. 843 (1945); *In re Phosphate Export Ass'n*, 42 F.T.C. 555 (1946); *In re Export Screw Ass'n of the United States*, 43 F.T.C. 980 (1947); *In re*

Similarly, as the Court of Appeals observed, judicial authorities interpreting the Webb-Pomerene Act uniformly have held that even if an association engages in conduct that falls outside the Act, such conduct does not abrogate the antitrust immunity that the Act provides for conduct within its scope. (Pet. App. A-22.) Thus, for example, in *United States v. Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. Mass. 1950), the fact that an association had engaged in some activities outside of the exemption did not lead to a declaration that the association's export agreement was invalid *in toto*; instead, only the offending practices were declared invalid and the court specifically refused to terminate the association's legitimate activities.[11] In sum, the Third Circuit's decision is an utterly unremarkable application of the Webb-Pomerene Act that is wholly consistent with three-quarters of a century of Webb-Pomerene precedent.

Even assuming *arguendo* that IRM's allegations of an international soda ash conspiracy were true, they would not change the fact that ANSAC's terminalling arrangements for export of its soda ash fall within the exemption provided by the Webb-Pomerene Act. As the court of appeals repeatedly noted, IRM asserted that a restraint of trade *in soda ash* somehow restrained trade *in terminalling*, but offered no

---

Sulphur Export Corp., 43 F.T.C. 820 (1947).

[11] *See also United States v. Anthracite Export Ass'n*, 1970 Trade Cas. (CCH) ¶ 73,348 (M.D. Pa. 1970) (finding association engaged in unprotected activities and enjoining the association from engaging in those activities in the future); *United States v. Concentrated Phosphate Export Ass'n*, 1969 Trade Cas. (CCH) ¶ 72,719 (S.D.N.Y. 1969) and *United States v. Alkali Export Ass'n*, Civ. No. 24-464, Final Judgment (S.D.N.Y. 1951) (both finding association engaged in unprotected activities, enjoining defendants from such activities in future, but specifically permitting defendants to continue as Webb-Pomerene associations).

factual basis whatsoever for that assertion either in the district court or on appeal -- despite being on notice that it was defending a summary judgment motion. (Pet. App. A-16, A-18-19 & n.13, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).)

Petitioner is not a buyer or producer of soda ash. Thus the Third Circuit properly affirmed the district court's conclusion that IRM had no antitrust standing to allege the claims which it made with respect to the soda ash market, particularly in light of its failure to demonstrate any causal connection between an alleged "international soda ash price-fixing cartel" and the competitiveness of the domestic terminalling market in which it operates. (Pet. App. A-16-19 & n.13, A-41 n.14; citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92 (3d Cir. 1986), *cert. denied*, 479 U.S. 821 (1986).)[12]

---

[12] In its Petition to this Court IRM improperly now attempts to argue for the first time that because Respondents supposedly have exercised market power to raise both domestic and international soda ash prices, this "necessarily" has reduced the quantity of soda ash shipped. (Pet. 13.) This argument is just as conclusory as the unsupported assertions rejected by the court below (*see* Pet. App. A-18, n.13); and the record actually shows that soda ash exports have *tripled* since ANSAC's formation. *See* n.9, *supra*. Moreover, even if this new argument had factual support and could be raised for the first time on appeal, it would fail for lack of standing. *See Associated General Contractors, supra*. Fundamentally, the heart of IRM's claim is that Respondents, through the vehicle of a Webb-Pomerene association, bargained for lower terminalling rates and ultimately decided to shift *all* of their business to a lower-priced competitor, making the *volumes* they ship irrelevant.

III. There Is No Conflict Between the Decision Below and Other Rulings by This Court or in Other Circuits

Despite Petitioner's attempt to create the appearance of a conflict, *none* of Petitioner's cases construe the Webb-Pomerene Act, nor do they challenge the underlying exempt status of defendants covered by other exemptions for acts taken within the scope of those exemptions. Rather, all of Petitioner's cases concern different exemptions and situations where the defendants were not only acting outside the bounds of an exemption, but where the challenged acts themselves were what was alleged to be causing injury to plaintiff.

Thus, *Beltz Travel Service, Inc. v. International Air Transport Ass'n*, 620 F.2d 1360 (9th Cir. 1980) (Pet. 18), involved the scope of immunity under the Federal Aviation Act of 1958. 49 U.S.C. § 1384. The court there held that a plaintiff tour operator could challenge an alleged conspiracy between airlines and rival tour operators to put plaintiff out of business because, while a C.A.B. approval immunized the airlines for *their* acts, they had joined a conspiracy with non-exempt tour operators and therefore became liable for their non-immune co-conspirators' acts against the plaintiff.

Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 (1979), another case cited by IRM (Pet. 16, 20), involved the McCarran-Ferguson Act exemption, 15 U.S.C. §§ 1011 *et seq.* The court there held that agreements between insurers and pharmacies were not "the business of insurance," that they thus were not eligible for McCarran-Ferguson Act protection, and that the agreements could be challenged by a pharmacy allegedly injured by the agreements. There was no hint, however, in *Group Life* that qualified insurance activities thereby lost that exemption's protection because of the non-exempt acts -- a point which the Ninth Circuit made explicit in *Klamath-Lake*

Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276, 1288 n.12 (9th Cir. 1983)(Pet. 18).

Finally, yet another McCarran-Ferguson case cited by Petitioner and now before this Court, *Hartford Fire Insurance Co. v. California*, No. 91-1111, (Pet. 9-10, 18) challenges certain U.S. insurers' refusals to provide particular coverage terms. The insurers were held liable, notwithstanding the McCarran-Ferguson exemption, because they allegedly conspired with offshore insurers who were not within the regulatory jurisdiction of U.S. states under the McCarran-Ferguson Act and because refusals by those offshore insurers to provide coverage were injuring plaintiff.[13]

All of these cases merely stand for the proposition that a firm which enjoys an exemption for certain activities may be liable under the antitrust laws for other conduct not covered by the exemption, or that if the firm conspires with a non-exempt entity which also acts to injure the plaintiff the otherwise exempt firm may be liable for the plaintiff's injuries caused by those acts. Nor is there anything remarkable about the fact that, in each case, the plaintiff was

---

[13] Because the issues before the Court in *Hartford Fire Insurance* are unrelated to the issues presented in this case, no point would be served by accepting Petitioner's invitation to defer denial of the present petition until the Court has decided *Hartford Fire Insurance*. (Pet. 9-10.) In contrast to Petitioner's argument here that all immunity under Webb-Pomerene is lost because of the conduct of association members outside of the scope of exemption, the issue before the Court in *Hartford Fire Insurance* concerns insurer liability for the actions of non-exempt entities under an entirely different statute, the McCarran-Ferguson Act. *See* U.S. Dept. of Justice, Brief For the United States As Amicus Curiae Supporting Respondents in *Hartford Fire Insurance Co. v. California* at 7-8 (arguing that the Court of Appeals "erred in concluding that a domestic insurance company automatically loses its antitrust immunity under the McCarran-Ferguson Act when it acts in concert with a 'non-exempt entity' such as a foreign reinsurer.")

injured by the challenged conduct, and thus had standing to seek relief.

By contrast, in this case there was no action by anyone other than U.S. producers of soda ash deciding to use their Webb-Pomerene association, ANSAC, to export their U.S. soda ash, and ANSAC's decision to move its business from IRM to a rival that offered more competitive terminalling rates. Any effect on IRM resulting from ANSAC's decision to change terminal operators was nothing more than an "inevitable consequence" of a cost-cutting high volume Terminalling Agreement wholly within the scope of the Webb-Pomerene exemption.

Nor, contrary to Petitioner's contentions, does the Third Circuit's opinion conflict with anything in this Court's decisions in either *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), or *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978). Both of those cases concern a very different statutory scheme, the Capper-Volstead Act, which, unlike the Webb-Pomerene Act, is expressly limited in coverage to "farmers" (7 U.S.C. § 291), thereby resulting in the disqualification of associations with members who conduct no farming whatsoever.

Neither *National Broiler* nor *Case-Swayne* held that *bona fide* members of an association could not engage in other activity besides farming. Indeed, *National Broiler* observed that many, if not all, association members directly or indirectly owned processing plants and simply held that those members which owned neither hatcheries nor grow-out facilities were not qualified for membership. 436 U.S. at 821, 827-28. And neither *Case-Swayne* nor *National Broiler* held that a validly-constituted Capper-Volstead association which acts outside its exemption loses its immunity with respect to acts within the scope of that exemption.

Finally, the plaintiff in *Case-Swayne* was a rival packer charging that the effect of including packers within the Sunkist system (not permitted under Capper-Volstead)

had a direct anticompetitive effect on him. Thus, that plaintiff's standing to challenge the conduct at issue was clear. By contrast, Petitioner in this case admits that it makes no claim for any injury sustained as a result of the alleged international conspiracy to fix soda ash prices; rather, its claim is for injury caused by Respondents' alleged fixing of rates paid for terminalling services. (Pet. 20.)

Thus, unlike the plaintiff packer in *Case-Swayne*, Petitioner suffered no direct injury to it as the result of the *soda ash price fixing* conspiracy it alleges, but only as the speculative and indirect result (if any) of whatever effect that alleged conspiracy may have on the quantity (and thus pricing) *of terminalling services*. As the Third Circuit correctly concluded, even if Petitioner had met its burden under *Celotex* and had demonstrated some causal connection between the international soda ash conspiracy and pricing for terminalling services (which it did not), that connection would simply be too remote to grant this Petitioner standing. (Pet. App. A-19.)

In sum, the Third Circuit correctly held that supposed anticompetitive conduct not injuring IRM and having no causal connection to the immune conduct of which it *did* complain was immaterial to its action. Even if Petitioner could prove its contentions that ANSAC and its members were part of an alleged but unsubstantiated international conspiracy to fix soda ash prices, that demonstration would not affect Petitioner's claims regarding terminalling, nor would it abrogate Respondents' immunity as to those acts for which Petitioner sought relief. The Court of Appeals correctly upheld the district court's determination that ANSAC was eligible for Webb-Pomerene protection, with the relevant issue being whether the *conduct* allegedly injuring Petitioner, *i.e.*, the arrangements ANSAC concluded for terminalling, were within the scope of the exemption. Nothing in their opinions merits further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Norman H. Seidler
Charles H. Critchlow
Counsel of Record
David A. Schwartz-Leeper
COUDERT BROTHERS
200 Park Avenue
New York, New York 10166
(212) 880-4400

Patrick W. Kittredge
Joseph M. Donley
KITTREDGE, DONLEY,
ELSON, FULLEM & EMBICK
421 Chestnut Street
Philadelphia, Penna. 19106
(215) 829-9900

Attorneys for Respondent
AMERICAN NATURAL SODA
ASH CORP.

February 23, 1993

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civ. A. No. 87-7541

INTERNATIONAL RAW MATERIALS, LTD.,

Plaintiff,

—v.—

STAUFFER CHEMICAL COMPANY, TG SODA ASH, INC., GENERAL CHEMICAL PARTNERS, TENNECO MINERALS COMPANY, FMC WYOMING CORP., KERR-MCGEE CHEMICAL CORP., AMERICAN NATURAL SODA ASH CORP.,

Defendants.

MEMORANDUM AND ORDER

HANNUM, Senior District Judge.

Background

The issue before the Court is the extent of an export trade association's antitrust exemption under the Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* Plaintiff International Raw Materials, Ltd. ("IRM") operates a Port Longview, Washington terminal used for loading soda ash onto ocean-going vessels. Defendants are the American Natural Soda Ash Corporation, an export trade association registered with the Federal Trade Commission under the Webb-Pomerene Act, and all of the member organizations of this association ("ANSAC defendants" or "ANSAC"). In response to IRM's allegations of antitrust violations[1], the ANSAC defendants have moved for

1 In its complaint filed on November 23, 1987, IRM seeks treble damages and injunctive relief under sections 4 and 16 of the Clayton Act, 15

dismissal pursuant to Fed.R.Civ.P. 12(b)(6), claiming that, as a matter of law, provisions of the Webb-Pomerene Act exempt them from liability. With the submission of supporting affidavits,[2] this motion is properly treated as a motion for summary judgment under Fed.R.Civ.P. 56. *See Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972).

By its complaint, IRM seeks remedy for ANSAC's horizontal price-fixing of domestic terminalling rates for the export of soda ash. There is no dispute that ANSAC acts as an independent marketing agent for its members—arranging joint shipment and distribution of its members soda ash for export. Citing its registration under the Webb-Pomerene Act, ANSAC claims that their efforts to seek the most efficient terminalling rates for these shipments are exempt from Sherman Act provisions because these efforts are in the course of export trade. IRM opposes dismissal both on grounds that there are material factual disputes over whether ANSAC can avail itself of Webb-Pomerene and on grounds that Webb-Pomerene does not protect the kind of violations that IRM has alleged.

Discussion

Summary judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Under the guidance of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106

U.S.C. §§ 15 and 26 for defendants' violations of the Sherman Act, 15 U.S.C. §§ 1 and 2.

2 IRM has moved to strike (Docket No. 12) the affidavit of Douglass D. Gardner (Docket No. 5), pursuant to rule 56(e) on grounds including that it is not stated on personal knowledge and "that it is replete with legal conclusions, ultimate facts, conclusions without factual bases and hearsay statements." Docket No. 12 at 2. Thereafter, ANSAC filed a second Gardner affidavit (Docket No. 15) in attempt to cure the first affidavit from any defects under Rule 56(e). IRM replied to the attempts to cure the defects and renewed their objections, arguing that "the Gardner affidavit is manifestly deficient under Rule 56." Docket No. 17. Because the Court does not rely on any statements of Mr. Gardner that are not in conformity with Rule 56(e), IRM's motion will be denied as moot.

S.Ct. 2505, 91 L.Ed.2d 202 (1986), "[f]or a dispute to be 'genuine', the evidence must be such that a reasonable jury could return a verdict for the nonmoving party." *Personal Touch, Inc. v. Lenox, Inc.*, 708 F.Supp. 108 (E.D.Pa.1989) (Reed, J.) (citing *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510). The *Anderson* Court explained that:

> the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

477 U.S. at 248, 106 S.Ct. at 2510 (citing 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983)). In considering ANSAC's motion, the Court views the evidence in a light most favorable to IRM, including the benefit of all reasonable inferences. *See Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.), *cert. denied*, 474 U.S. 1010, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985).

IRM has urged that, in view of the novel issues of statutory interpretation, summary judgment is inappropriate on this limited record. *See* Docket No. 20 at 2-4; Docket No. 18 at 1-3 (quoting *Bingham Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984) (reversing summary judgment); *Security Pacific National v. OL.s Pacific Pride*, 549 F.Supp. 53, 55 (W.D.Wash. 1982)). The ANSAC defendants counter that summary judgment is warranted because a narrow issue controls: ANSAC's antitrust exemption for its dealings with IRM and the terminalling industry. *See* Docket No. 21 at 5 (citing *Commonwealth of Pennsylvania v. Pepsico, Inc.*, 836 F.2d 173 (3d Cir. 1988)). In *Pepsico*, the Third Circuit affirmed dismissal without stipulated facts and prior to discovery where the conduct charged in the complaint was subject to a statutory antitrust exemption under the Soft Drink Interbrand Competition Act of 1980, 15 U.S.C. §§ 3501-03. *Pepsico*, 836 F.2d at 181. While acknowledging that summary judgment is disfavored where novel questions are presented, this Court concludes that a more developed record is not required in view of the Court's dispositive interpretation of ANSAC's exemption for the conduct charged by IRM. *See id.*

The Scope of the Webb-Pomerene Exemption

As the Court stated in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986), "[t]he starting point in statutory construction is, of course, the language of the statute itself." *Id.*, 106 S.Ct. at 2502. Moreover, "[a]bsent a clearly expressed legislative intention to the contrary, that [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring). The statutory sections, in relevant part, provide:

> § 61. *Export trade; definitions*
>
> The words "export trade" wherever used in sections 61 to 65 of this title mean solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words "export trade" shall not be deemed to include the production, manufacture, or selling for consumption or resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.
>
> The words "trade within the United States" wherever used in Sections 61 to 65 of this title mean trade or commerce among the several States or in any Territory of the United States, or in the District of Columbia or between any such Territory and another. . . .

15 U.S.C. § 61.

> § 62. *Export trade and antitrust legislation*
>
> Nothing contained in sections 1 to 7 [Sherman Act] of this title shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade, or an agreement made or act done in the

> course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association: *Provided*, That such association does not, either in the United States or elsewhere, enter into any agreement, understanding, or conspiracy, or do any act which artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by such association, or which substantially lessens competition within the United States or otherwise restrains trade therein.

15 U.S.C. § 62.

The Court credits ANSAC's claim that their efforts to reduce terminalling costs fall squarely within the plain language of § 62's protection for "an agreement made or act done in the course of export trade by such association." 15 U.S.C. § 62. ANSAC's independent export of members' soda ash, including terminalling rate negotiations and shipments, is within the course of export trade. There is no dispute that these activities are in furtherance of transporting the export product to the port for loading onto ocean-going vessels bound for sales in foreign lands. The Act's definitional section also supports this interpretation, providing that "export trade" includes trade "in the course of being exported from the United States" and excludes "the production, manufacture, or selling for consumption or resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale." *Id.* § 61.

Rather than demonstrating a clearly expressed contrary legislative intention, the history of Webb-Pomerene further supports ANSAC's position. Congress enacted the Webb-Pomerene Act in 1918 "to encourage American exports by exempting exports from constraints which placed them at a competitive disadvantage in foreign trade." *Horizons International, Inc., v.*

Baldrige, 811 F.2d 154, 163 (3d Cir., 1987). In explaining the historial context of the Act, Justice White reported that:

> Congress recognized that trade in foreign nations is not ringed about with the antitrust restrictions which keep domestic industry competitive. Congress found foreign trusts to have substantial advantages over their American competitors. They can offer to extend credit and fill large orders which no single American firm could fill; they can maintain staffs to keep in touch with foreign demand more cheaply than any single American seller; and their advertising and *distribution costs* are generally lower than those of separate American firms. Having made these findings, Congress concluded that American firms should be allowed to combine to achieve lower costs, lower prices, and more comprehensive and effective service, in order to be able to compete on an equal footing for foreign shipments.

United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 211-12, 89 S.Ct. 361, 368, 21 L.Ed.2d 344 (1968) (White, J., dissenting) (emphasis added). As Justice White's explanation shows, Congress sought to promote domestic exports by fostering more efficient economies of scale in these Webb-Pomerene associations. Achievement of lower terminalling rates, part of distribution costs, is the kind of cost-cutting measure that elevates domestic enterprises to the level of these foreign trusts. Thus, the efforts of ANSAC for which IRM seeks remedy are the kind of measures that Congress sought to foster.

The Court acknowledges that both the plain language and the history of the Act demonstrate concern about inappropriate use of the Act to restrain domestic trade. Nevertheless, these concerns are not aimed at the kind of restraint alleged here—where IRM seeks remedy for ANSAC's efforts to reduce distribution costs. Rather than protecting domestic export service industries, the provisos of the Webb-Pomerene exemption are aimed at balancing the benefits of encouraging exports with appropriate safeguards for the American consumer. *See United States*

v. Concentrated Phosphates Export Ass'n, 393 U.S. 199, 206, 89 S.Ct. 361, 366, 21 L.Ed.2d 344 (1968) ("Congress evidently made the economic judgment that joint export associations could increase American foreign trade without depriving American consumers of the main advantages of competition.").

In one of the few authoritative cases on the scope of Webb-Pomerene's antitrust exemption,[3] Judge Wyzanski in *United States v. Minnesota Mining & Mfg. Co.*, 92 F.Supp. 947 (D.Mass.1950), construed the exemption broadly and allowed the association to continue with specified changes. *Id.* at 966. Judge Wyzanski anticipated that, by virtue of their joint efforts, a successful export company might naturally cause adverse effects on other domestic enterprises involved in exporting as well as on domestic competition generally. *Id.* at 965. Judge Wyzanski opined that, "if there are only these inevitable consequences an export association is not an unlawful restraint [because] [t]he Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted." *Id.*

In this action *Minnesota Mining* is persuasive in that it recognizes that certain incidental domestic restraints, such as lower costs for export services, may result from the formation of export associations pursuant to Webb-Pomerene. If ANSAC's efforts to achieve lower terminalling rates violate the Sherman Act, this must be permitted as an incidental restraint in the course of export trade. *Id.* Furthermore, these reduced terminalling costs must be permitted even if ANSAC has engaged in other conduct unprotected by the Webb-Pomerene exemption. *See id.* at 966 (export association permitted with specified changes in conduct).

---

3 For background and discussion of the scope of Webb-Pomerene exemption, see W.L. Fugate, The Antitrust Export Exemption: The Old Webb-Pomerene Act and the New Export Trading Company Act, 15 Vand.J.Trans.L. 673 (1982) (section III considers judicial interpretation of Webb Act); 1 W.L. Fugate, Foreign Commerce and the Antitrust Laws §§ 7.1-7.19 (3d ed. 1982 & Supp. 1984 & Supp. 1986) (section 7.13 deals with export trade practices in general).

Disqualifying ANSAC from Webb-Pomerene Exemption

In addition to the above discussed provisos, IRM argues that there are material factual disputes over whether ANSAC is entitled to Webb-Pomerene's protection. Specifically, IRM seeks further discovery in attempt to show that ANSAC must be disqualified from § 62's protection.

First, IRM has alleged a material factual dispute over whether ANSAC is engaged solely in the export of soda ash. IRM has suggested that ANSAC has made efforts, however veiled, to develop its own terminalling service through support of the Port of Portland terminalling project with Hall Buck Marine, Inc. *See* Docket No. 13 at 27-28; Docket No. 14, Affidavit of William P. O'Neill, Jr. at ¶¶ 22-26 ("ANSAC is *de facto* entering into the general business of terminalling services in white bulk chemical product [by long-term lease effectively underwriting project].") IRM urges that § 62's protection should be inapplicable if it shows that ANSAC's purpose has gone beyond soda ash export and now, in reality, extends to the terminalling of white bulk chemical product.

On its face the "sole purpose" clause is one of three types of statutory protection whereby § 62 provides Sherman Act exemptions: (1) "an association entered into for the sole purpose of engaging in export trade," (2) "an agreement made [in the course of export trade by such association]", and (3) "act done in the course of export trade by such association." 15 U.S.C. § 62. Given § 61's broad definition of "export trade," a long term lease for terminalling services—even a lease effectively financing the project—is within the course of export trade and thus within the "sole purpose" exemption of § 62. The Court concludes that a cost-cutting long term lease for terminalling services, or for any other export service, would appropriately further the goals of the Webb Act by encouraging exports. Nevertheless, if IRM were to aver that ANSAC has been directly profiting from the terminalling services of other export products, such conduct would not fall within this exemption.

Next, IRM urges that ANSAC cannot avail itself of Webb-Pomerene because its member organizations are owned, in part, by foreign companies. There is no support in the statutory language authorizing this Court to strip ANSAC of Webb-Pomerene protection because of foreign ownership interests in ANSAC or its members. While the legislative history demonstrates Congressional concern for aiding domestic industries in their competition in foreign markets, IRM has not shown that these concerns rise to the level of a clearly expressed legislative intention empowering courts to determine acceptable limits of foreign interests in Webb-Pomerene associations or members.[4]

Finally, IRM alleges a material factual dispute over whether ANSAC is in violation of domestic soda ash trade.[5] In support,

---

4 As the Third Circuit explained in *Horizons International v. Baldrige*, 811 F.2d 154, 164 (3d Cir.1987), "[t]he Senate Report notes that the section 303(a) [Title III of the Export Trading Company Act of 1982] standards for certification are to a large extent 'a codification of court interpretations of the Webb-Pomerene exemption to antitrust law.' " 811 F.2d at 164 (quoting S.Rep. No. 27, 97th Cong., 1st Sess. 10 (1981)). So, although similar Webb Act standards are helpful in interpreting provisions of the Export Trading Company Act of 1982 ("ETCA"), it is unclear to what extent interpretations of ETCA provisions aid interpretation of Webb Act provisions. *See Horizons International, Inc.*, 811 F.2d at 164 & n. 10 (provisions of 303(a) of Title III parallel section 2 of Webb Act); W.L. Fulgate, The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act, 15 Vand.J.Trans.L. 673, 673-74 (1982) (because standards similar, "precedents under the Webb Act will remain important for interpreting the new legislation."). With that caveat, the Court notes that the ETCA empowers the Secretary of Commerce, with the concurrence of the Attorney General, to promulgate regulations and issue guidelines. *See* 15 U.S.C. § 4017(a) and § 4020. As noted by a prominent commentator, under the guidelines, "[w]hile the definition of *persons* does not include foreign firms, U.S. subsidiaries of foreign companies may apply for certificates [entitling holder to ETCA exemption], and foreign companies may be members of a U.S. entity applicant." 1 W.L. Fulgate, Foreign Commerce and the Antitrust Laws § 7.20 (3d ed. 1982) (Supp.1984) (citing Dept. of Congress, International Trade Administration, Guidelines for Issuance of Export Trade Certificates of Review, April 8, 1983, 48 Fed.Reg. 15, 937, *reprinted in* 44 Antitrust Trade Reg.Rep. (BNA) 816 (Apr. 14, 1983)).

5 Section 5 of Webb-Pomerene empowers the government to seek to enjoin any conduct of ANSAC in violation of the Sherman Act. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968); *United States Alkali Export Ass'n v. United*, 325 U.S. 196, 65 S.Ct. 1120; 89 L.Ed. 1554 (1945).

IRM has averred, *inter alia*, that domestic prices have risen since ANSAC's formation. Given this Court's interpretation of Webb-Pomerene, this issue is not material to the dispute at hand.[6] Even if IRM could properly proceed with discovery and proof of ANSAC's conduct in restraint of domestic soda ash trade, this would not destroy ANSAC's exemption for conduct in the course of export trade. *See Minnesota Mining*, 92 F.Supp. at 966. Accordingly, this dispute is immaterial under Rule 56 because it could not affect ANSAC's entitlement to Sherman Act exemption for its dealings with IRM or the terminalling industry more generally.

Conclusion

In sum, the Court finds that the language of § 62 protects ANSAC's independent export of soda ash because these efforts are "in the course of export trade." 15 U.S.C. § 62. The history of Webb-Pomerene strongly supports this interpretation. Next, the Court concludes that it is not empowered to strip ANSAC of Webb-Act protection based on foreign ownership in the component membership of ANSAC. Finally, allegations of ANSAC's non-exempt antitrust violations are immaterial in that they could not affect the availability of § 62's protection for the conduct charged in the complaint. For these reasons, IRM's complaint will be dismissed pursuant to Rule 56, because the Court finds no *material* disputes and concludes that the ANSAC defendants are entitled to judgment as a matter of law.[7]

An order reflecting this disposition follows.

---

6 The Court credits ANSAC's argument that this claim is irrelevant:

> Plaintiff is not a buyer of soda ash; its claim is for injury caused by alleged fixing of rates paid for terminalling services, not for soda ash. Even if, after a long and complex trial, domestic soda ash price fixing were found to exist, it would not change the fact that the Webb-Pomerene exemption protects ANSAC's procurement of terminalling services in the course of exporting its goods overseas.

Docket No. 21 at 4.

7 In view of this dismissal, outstanding discovery motions will be denied as moot.

ORDER

AND NOW, this 22nd day of June, 1989, upon consideration of defendants' Motion to Dismiss the Complaint (Docket No. 5), plaintiff's Motion to Strike the Affidavit of Douglas D. Gardner Pursuant to Rule 56(e), Fed.R.Civ.P. (Docket No. 12), Reply Memorandum of Plaintiff in Opposition to Defendants' Motion to Dismiss (Docket No. 13), Affidavit of William P. O'Neill, Jr. (Docket No. 14), Second Affidavit of Douglas D. Gardner (Docket No. 15), Defendants' Reply Memorandum to Plaintiff's Memorandum in Opposition to Motion to Dismiss (Docket No. 16), Plaintiff's Reply Memorandum in Support of Their Motion to Strike the Gardner Affidavit (Docket No. 17), Plaintiff's Motion to File Sur Reply Memorandum in Opposition to Defendants' Motion for Summary Judgment (Docket No. 18), Plaintiff's Pre-Argument Memorandum (Docket No. 20), Summary of Defendants' Argument Memorandum (Docket Entry No. 21), Argue Sur: Oral Argument on Defendants' Motion to Dismiss, Plaintiff's Motion to Strike (Docket Entry No. 22), Transcript of Argument re: Motions of July 19, 1988 (Docket No. 24), Plaintiff's Motion to Require Defendants to Respond to Plaintiff's Discovery and Preserve Certain Documents (Docket No. 26), and Defendants' Memorandum in Opposition to Plaintiff's Motion for an Order Compelling Discovery and Directing the Preservation of Documents (Docket No. 27), it is hereby ORDERED that:

1. The Defendants' Motion to Dismiss, treated as a motion for summary judgment, is GRANTED.

2. The Plaintiff's Motion to Strike the Gardner Affidavit is DENIED as moot.

3. The Plaintiff's Motion to Require Defendants to Respond to Plaintiff's Discovery and Preserve Certain Documents is DENIED as moot.